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HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 46

REX TRAILER COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The District Court did not render an opinion. The opinion of the Circuit Court of Appeals (R. 17-23) is reported at 218 F. 2d 880.

Jurisdiction

The judgment of the Court of Appeals was entered on January 18, 1955 (R. 23). The petition for a writ of certiorari was filed on April 11, 1955, and granted on May 23, 1955 (R. 24). The jurisdiction of this Court is founded upon 28 U. S. C., sec. 1254(1).

Statute Involved

The statute involved is Section 26 of the Surplus Property Act of 1944 (58 Stat. 765, 780, 50 U. S. C. App. (1946 ed.), Section 1635),[1] the pertinent portion of which provided:

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or
>
> (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

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[1] Section 26 of the Surplus Property Act of 1944 was repealed and reenacted as Section 209 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, 392, 40 U. S. C., Section 489).

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

* * * * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

Question Presented

Whether civil recovery by the United States from petitioner of the statutory sum of $2,000 for obtaining surplus property by fraud on each of the five counts of complaint based on Section 26(b)(1) of the Surplus Property Act of 1944 is barred by the prohibition against double jeopardy of the Fifth Amendment by reason of the prior criminal indictment against petitioner for the same offenses and its payment of the fines imposed, when on the admitted facts the United States suffered no pecuniary loss or damage.

Statement of the Case

Respondent's civil complaint against petitioner in five separate counts, filed in the District Court on August 9, 1950 (R. 1-3), was brought pursuant to the provisions of Section 26(b)(1) of the Surplus Property Act. Jurisdiction in the District Court was conferred by Section 26(c) of that Act. Count I of the complaint alleged that during the week of June 17, 1947, at Tinker Field, near Oklahoma City, Oklahoma, petitioner "did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration" for the purpose of obtaining a certain described motor truck (R. 2). Counts II

through V of the complaint are identical with Count I except as to the name of the person making the false statement and the description of the motor trucks involved. Judgment was asked in the sum of $2,000 on each count, or a total of $10,000 (R. 2-3). No damage to respondent was alleged in the complaint.

Petitioner in its amended answer pleaded that the action was to recover a statutory penalty and not "for the collection of any obligation or indebtedness owing to or the recoupment or recovery of damage suffered by the (United States)" (R. 6), and that petitioner had previously been indicted[2] in five counts with the identical offenses charged in the complaint, to which indictment it had pleaded *nolo contendere* and upon which a total fine of $25,000 was imposed on June 23, 1949, by the District Court of the United States for the Western District of Oklahoma and paid by petitioner (R. 6-7, 8-11).

Petitioner in its amended answer further alleged that the trucks in question "were advertised and offered for sale by the War Assets Administration at a fixed price and were sold first come first served to qualified purchasers;" that in the advertised offer for sale those granted priority of purchase were the "Housing Expediter and CPA Certificate Holders, Federal Agencies, Certified Veterans World War II, RFC for Small Business, States and

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[2] The indictment was brought under 18 U. S. C. (1940 ed.), Section 80, 35 Stat. 1095 (R. 8), which provides in part as follows:

"* * * * whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made, or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any manner, within the jurisdiction of any department or agency of the United States or of any corporation in which the United States is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Political Subdivisions and Certified Non-Profit Institutions" in that order of priority, and that if all available trucks were not purchased by those having priority, certain manufacturers and dealers of construction, mining and farm machinery were to have non-priority rights to purchase the trucks at the advertised price and that petitioner was such a dealer (R. 7). It was further alleged that the "false statements of a material fact in writing to the War Assets Administration" charged in the indictment were statements qualifying the persons named in each of the counts for a priority right to purchase, and that at the advertised sale all of the trucks were sold to those having or claiming priorities (R. 7).

In conclusion, it was alleged that respondent was not damaged and did not suffer any loss because of the sale of such trucks and received the full advertised offering price, and if the trucks had not been sold to the persons purchasing the same, they would have been sold at the same price to other priority or non-priority purchasers, and that the complaint seeks to recover a further penalty in addition to the fine and penalty adjudged and paid by petitioner, thereby placing it in double jeopardy contrary to the Fifth Amendment (R. 7-8).

Both parties moved for summary judgment on the pleadings (R. 3-5), and the District Court granted respondent's motion and overruled that of petitioner (R. 12). Judgment was thereupon entered that respondent recover from petitioner the sum of $10,000 and costs (R. 13). On appeal, the judgment was affirmed by the court below (R. 23).

Summary of Argument

The provision in Section 26(b)(1) of the Surplus Property Act for payment to the United States of $2,000, as distinguished from the double damages also recoverable, is a penalty to vindicate the public justice, *United States* v. *Witherspoon*, 211 F. 2d 858 (C. A. 6), and the instant action to collect such penalty is barred by the double jeopardy clause of the Fifth Amendment. To exact the arbitrary sum of $2,000 for each violation of the statute in this case where the Government admittedly had no financial loss stamps the action as being plainly punitive.

This Court's decisions in *Marcus* v. *Hess*, 317 U. S. 537 and *Helvering* v. *Mitchell*, 303 U. S. 391, relied upon by the court below, do not support the recovery of monetary civil sanctions given the Government by Congress as against the bar of double jeopardy where the Government has sustained no pecuniary loss. The fraudulent collusive bids in the *Hess* case necessarily damaged the Government, and the recovery there of $2,000 plus double damages under the False Claims Act did no more than make the Government whole for actual loss. Nor does the decision in the *Mitchell* case sustaining a 50% tax fraud penalty as a remedial sanction to reimburse the Government for expense of investigation and loss to the public revenue furnish basis for recovery in this case where the Government had no loss.

Any constitutional question concerning the statute involved may be avoided by construing the statute to permit recovery of the $2,000 penalty only when it will no more than compensate the Government for loss sustained.

The court below departed from the record in holding that the Government was damaged.

Argument

The Government's instant action to recover the sum of $2,000 under Section 26(b)(1) of the Surplus Property Act on each of five counts of complaint is, in fact, punitive and not remedial, and places petitioner twice in jeopardy contrary to the Fifth Amendment.

The Fifth Amendment to the Constitution of the United States guarantees that no person shall be "subject, for the same offence to be twice put in jeopardy of life or limb". Petitioner pleaded this constitutional prohibition against double jeopardy as a defense to the Government's action herein brought under Section 26(b)(1) of the Surplus Property Act of 1944 on the ground that petitioner previously had been indicted and paid criminal fines imposed on the same transactions set forth in the five counts of the Government's complaint (R. 6-7). The five counts of complaint and the corresponding counts of the previous indictment are identical in charging petitioner with causing a named individual "to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining" a certain described motor truck (R. 2-3; 9-10). The false statements charged qualified the individuals named with a priority right to purchase (R. 7).[3]

Petitioner in its answer in defense pleaded facts showing that the Government suffered no damage or loss from the sale of such trucks, having received the full advertised offering price (R. 8), and that the purpose of the action

[3] While not spelled out in the record, the priority claimed was that of certified veterans and the case was so argued in the Court of Appeals (Appellant's Brief, p. 9; Appellee's Brief, p. 26).

was not the collection of any obligation or indebtedness owing to the Government or the recovery of any damages suffered (R. 6). Those allegations were in effect admitted by the respondent in moving for summary judgment on the pleadings, just as the allegations of the complaint which failed to allege any damage to the respondent were in effect admitted by petitioner's motion for summary judgment.

The Court below held that the provision in Section 26 (b)(1) of the Surplus Property Act for the payment to the United States of "the sum of $2,000.00 for each such act" is compensatory in nature,[4] and hence petitioner's plea of double jeopardy was no bar to the maintenance of the action. Petitioner submits this is plainly wrong. The very language of this section of the statute reading

> "* * * shall pay to the United States the sum of $2,000 for each such act *and* double the amount of any *damage* the United States may have *sustained* * * *"[5]

clearly shows that Congress intended "the sum of $2,000 for each such act" as a penalty to vindicate public justice as distinguished from an action to make the Government whole for any damage or loss it "may have sustained * * * *." Suppose, for example, the Government had sustained a loss of only $25. Could it still plausibly be contended that an exaction of the sum of $2,000 would be compensatory; or suppose the Government had sustained no loss at all, as is admitted to be the case here, what basis would there be for a judgment in the arbitrary sum of $2,000 for each violation of the statute? Is not the imposi-

[4] The opinion below as certified and printed in the record in a number of instances refers to Section 26(a)(1) although it is clear that Section 26(b)(1), the statute involved, is the intended citation. This error is corrected in the reported opinion at 218 F. 2d 880.

[5] All italics in quotations are petitioner's unless otherwise stated.

tion of such a sanction in truth and in fact a criminal penalty no matter what other name it may be called, when by its very nature it is a penalty? See *Helwig* v. *United States*, 188 U. S. 605, 613.

The principle is stated in 23 Am. Jur., sec. 29, p. 625, as follows:

> "By damages is understood the indemnity, or composition in money, which the law gives to the injured party for the breach of a contract or a duty. In theory, such damages are precisely commensurate with the injury received, except in the case of exemplary damages or smart money, where some element of fraud, malice, gross negligence, or oppression enters into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery."

The Sixth Circuit Court of Appeals in considering this very question in *United States* v. *Witherspoon*, 211 F. 2d 858, held that Section 26(b)(1) was penal and therefore subject to the five-year limitations provision of 28 U. S. C., Sec. 2462. The Court stated at page 861:

> "The statute itself distinguishes between the sum of $2,000 required to be paid for each fraudulent act in violation of the statute, and the damages, which are also recoverable. * * *
>
> "The exaction of the arbitrary sum of $2,000 for each offense of obtaining, by fraud, surplus property, *without regard to its value*, is a provision for a penalty. *Its purpose is, obviously, to punish an offense against the public justice*, in addition to double the amount of all damages suffered by the government."[6]

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[6] As noted by the court in the *Witherspoon* opinion, the decision by the Fifth Circuit Court of Appeals in *United States* v. *Weaver*, 207 F. 2d 796 is to the contrary. That case also involved a limitations question.

The present action seeking to exact such penalty necessarily subjects petitioner to double jeopardy prohibited by the Fifth Amendment. See *Marcus* v. *Hess*, 317 U. S. 537, 548-549. The fact that the action is civil in form as provided by Section 26(d) of the Surplus Property Act does not preclude the application of the double jeopardy clause if, in fact, the remedy is penal. See *United States* v. *Chouteau*, 102 U. S. 603, 611; *Coffey* v. *United States*, 116 U. S. 436, 445; *United States* v. *LaFrance*, 282 U. S. 568, 574.

The court below held that *Marcus* v. *Hess*, 317 U. S. 537, supports the decision that the sum of $2,000 in Section 26 (b)(1) is compensatory in nature. On the contrary, the opinion of the Court in that case makes it crystal clear that if on the facts involved in a *particular* case the exaction, no matter what name it might be called, is a second punishment for the same offense it would be in contravention of the double jeopardy clause of the Fifth Amendment. Certainly *Marcus* v. *Hess* is not authority that the Government may exact a penalty under the guise of damages where, as here, it is admitted that the Government sustained no damage or suffered no loss. There an action was brought under the False Claims Act (31 U. S. C., Section 231) providing that a person who commits certain frauds upon the United States "shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained * * * together with the costs of suit; * * *". The defendants were charged with defrauding the Government out of money through the use of fraudulent collusive bids on certain building projects. The defendants previously had been indicted for the same transactions and fined and, as here, pleaded double jeopardy. This Court in rejecting such defense held that the

statutory provision for $2,000 plus double damages was remedial and not penal, stating (317 U. S. at 548-549):

> "The application of the double jeopardy clause to *particular cases* has not been an easy task for the courts. The subject has recently been thoroughly explored in *Helvering* v. *Mitchell*, 303 U. S. 391, in which the Court analyzed the cases now pressed upon us and emphasized the line between civil, *remedial actions brought primarily to protect the government from financial loss* and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to 'jeopardy' within the constitutional meaning. *Ibid.*, 397, 398. We may start, therefore, with the language of the Mitchell case: 'Congress may impose both a criminal and civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether * * * (the statute in question) * * * imposes a criminal sanction. That question is one of statutory construction.' *Ibid.*, 399. Is the action now before us, consisting of double damages and the $2,000 forfeiture, *criminal* or *remedial?*
>
> "It is enough for present purposes if we conclude that the instant proceedings are *remedial* and impose a civil sanction. The statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy. * * * We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete *indemnity* for the injuries done it."

In determining that the statute was not designed to impose criminal punishment but to give the United States reparation in damages for injuries sustained from frauds

in the spending of the Government's money, the Court concluded (at pp. 551-552):

> "We think the chief purpose of the statutes here was to provide for *restitution* to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. This conclusion is consistent with a statement made immediately before final passage of the bill. A Senator discussing these sections said: 'The government ought to have the privilege of coming upon him (a fraudulent contractor) or his estate and his heirs and recovering the money of which it was defrauded.' The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress."

The collusive bids in the *Hess* case by their very nature resulted in damage to the Government in increased costs, and the action there did no more than make the Government whole for actual loss. In the case at bar the Government admits that the United States suffered no actual loss, and consequently, the action is not to make it whole and to recover a loss.

In *Helvering* v. *Mitchell*, 303 U. S. 391, referred to by the Court in its opinion in *Marcus* v. *Hess*, *supra*, the defendant had been indicted for fraudulent evasion of income taxes and was acquitted. The Government then brought action to recover the omitted taxes plus an additional 50% based on the taxpayer's fraud. In holding that the recovery of the additional tax was not barred by the double jeopardy clause of the Fifth Amendment, the Court stated (303 U. S. at 401):

> "The remedial character of sanctions imposing additions to a tax has been made clear by this Court in

> passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."

The loss in the *Mitchell* case was to the public revenue and the expense that of ferreting out taxes owing which were fraudulently evaded. The decision in that case goes no further than to hold that where the Government has suffered a pecuniary loss, the recovery may include a sufficient sum to cover the Government's expense in recovering the loss so that it will be made entirely whole. Neither *Mitchell* nor *Stockwell* v. *United States*, 13 Wall. 531, cited in the opinion below (R. 22), is authority that respondent may recover in this civil action the flat rate of $2,000 per offense to reimburse the Government for investigative expense in the criminal proceedings.

The opinion below notes that statutes are to be construed to avoid constitutional issues (R. 19). Unconstitutionality is avoided by construing the statute to permit recovery of the $2,000 penalty to those cases where the Government has been damaged. That Congress may have intended the statute as a compensatory remedy cannot be dispositive of a particular case, such as this, where to enforce the remedy is not to compensate but to penalize. And if the statute be construed to impose payment of the arbitrary sum of $2,000 irrespective of loss, then such exaction is punishment for violation of the statute and the double jeopardy clause bars this action.

To show that the Government was damaged here, the court below, near the close of its opinion, stated the following (R. 22):

"We may concede that if veterans and all others having priority did not purchase the motor vehicles advertised, that defendant or other persons having no priority might have purchased same. However, such assumption ignores realities. The shortage of civilian motor vehicles in 1946-7 was very acute and was well known. Motor vehicles made up a large portion of the surplus property set aside for the exclusive use of veterans. * * *

"We think the government was damaged in several respects and *in a manner difficult to assess in monetary damages.* The government wished to sell its surplus motor vehicles to certified veterans in order to assist in their re-assimilation into civil life, and it was natural that the prices and conditions under which the government was willing to make these sales to veterans was more favorable than in the market place where gray and black market conditions were not uncommon. Defendant's fraud caused the government to deal with a class to which it did not desire to sell its surplus motor vehicles. Further, by its conduct if there were any vehicles left after supplying the wants of service men, various agencies of the Federal Government had next priority. If the supply was exhausted by frauds such as perpetrated by the defendant there was no other place for Government Agencies to purchase needed vehicles except on the open market."

None of the foregoing is supported by *any facts* in the record in this case. Even if it be assumed that the claimed shortage of motor vehicles in 1946-1947 is so well known that it is a matter subject to judicial notice, there is nothing in the record to support the assertion that the prices and conditions upon which the Government was willing to make the sales involved *in this case* "was more favorable than in the market place." There is no evidence in the record

that the motor vehicles were offered at any bargain prices, or that the advertised price paid by petitioner was less than the current market price.

Moreover, petitioner under the terms of the sale was among the class eligible to purchase the motor trucks on a non-priority basis at the offered price if not sold to the listed priority holders (R. 7). And contrary to the statement in the opinion below, the Federal agencies had a higher priority than veterans and not a lower priority (R. 7), a priority which was not exercised, so that the trucks then became available for purchase by veterans. Since the Federal agencies did not want the trucks, the Government was in no way financially injured when petitioner bought them at the offered price on a lower claimed priority.

The instant action is solely to vindicate the Government again in its sovereign capacity as preserver of the peace and not to recover compensation for loss or damage suffered. Petitioner's defense of double jeopardy should be sustained.

CONCLUSION

For the foregoing reasons, the judgment entered below should be reversed.

Respectfully submitted,

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